United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4132

United States Court of Appeals

FOR THE SECOND CIRCUIT
No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

ITT WORLD COMMUNICATIONS INC., THE WESTERN UNION TELEGRAPH COMPANY, and STATE OF HAWAII,
Intervenors.

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

LEBOEUF, LAMB, LEIBY & MACRAE,
Attorneys for Intervenor,
ITT World Communications Inc.,
140 Broadway,
New York, New York 10005.
(212) 269-1100

Of Counsel:
CHARLES P. SIFTON
JOHN S. KINZEY
and
HOWARD A. WHITE
JOHN A. LIGON
ITT World Communications Inc.
67 Broad Street,
New York, New York 10005.
(212) 797-3300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. *Judicial Decisions*

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

ITT WORLD COMMUNICATIONS INC., THE WESTERN UNION TELEGRAPH COMPANY, and STATE OF HAWAII,

Intervenors.

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

Preliminary Statement

Intervenor ITT World Communications Inc. ("ITT Worldcom") submits this brief in support of the Petition of Western Union International, Inc. ("WUI") to reverse a Memorandum Opinion and Order (the "Order") released by the Federal Communications Commission ("FCC") on June 23, 1975.[1] In that Order, the FCC held that Western

[1] The FCC's Order is reproduced in the Appendix, pp. A7-A60.

Union Telegraph Company[2] ("WU") is not prohibited by law from providing Mailgram service between the continental United States and Hawaii.

Statement

At issue in this proceeding is the legality of WU's first attempt to resume international telegraph operations since 1963, when it was divested of its international facilities pursuant to a Congressional mandate.[3] The full significance of WU's proposed resumption of international service cannot be understood without a preliminary discussion of the structure and history of the telegraph industry.

a) *The structure and history of the telegraph industry*

WU is a common carrier of telegrams and other forms of "record" (or non-voice) communications. It is regulated by the FCC pursuant to the Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. §§201 *et seq.* In 1944, WU merged with its only domestic competitor, Postal Telegraph Cable Company ("Postal"), and secured a "virtual monopoly"[4] over telegraph service within the continental United States. Nothing which has occurred since 1944 has lessened WU's dominance of the U.S. telegraph industry and WU remains to this day the only domestic carrier of telegrams.

---

[2] As indicated below, Petitioner WUI is a corporation formed in 1963 to acquire the international record communication business theretofore carried on by WU, pursuant to the mandated divestiture required by the Western Union merger legislation which is presently codified as 47 U.S.C. §222. WUI has no affiliation with WU despite the similar name. See p. 10, *infra*.

[3] 47 U.S.C. §222(e).

[4] *Western Union Telegraph Co.* v. *U.S.*, 267 F.2d 715, 723 (2nd Cir. 1959).

In recent years, WU has, in addition to its telegraph operations, provided teletypewriter exchange service (commonly referred to as "telex" service) to a growing number of commercial organizations and governmental agencies. Through a teletypewriter exchange system, a teletypewriter located in a telex subscriber's offices can be connected with any of the thousands of other teletypewriters served by the exchange, in a manner analogous to the way in which telephone calls are connected. A telex may thus be sent directly from sender to recipient without a third party making final delivery, as is necessary with a telegram. Prior to 1970, both WU and the American Telephone and Telegraph Company ("ATT") offered teletypewriter exchange service to subscribers. However, in 1970, WU acquired ATT's teletypewriter exchange system, known as "TWX".[5] Through this acquisition, WU, which had already obtained a monopoly over domestic telegraph service, extended its monopoly of domestic record communication services to include the domestic telex/TWX network.[6]

Today, WU maintains a nationwide system of approximately 100,000 interconnected teletypewriters, over which it carries both telegraph and telex traffic. While the availability of telex service now allows direct transmission of messages between sender and recipient when both are telex subscribers, traditional telegrams are still an essential means of communication for those who do not have telex service. WU maintains telegraph offices throughout the nation to serve the general public. Domestic telegrams accepted at these offices are transmitted over WU's tele-

---

[5] *The Western Union Telegraph Co.*, 24 F.C.C. 2d 664 (1970).

[6] *Id.*, 24 F.C.C. 2d at 688; *International Record Carriers' Communications*, 38 F.C.C. 2d 543, 546 (1972).

typewriter network and are then delivered to the recipient by one of the optional methods of delivery WU offers.

In contrast to the monopoly which WU enjoys within the continental United States, telegraph messages and telex communications between the United States and international points are carried by a number of competing international record carriers (the "IRCs"). The three principal IRCs are ITT Worldcom, WUI, and RCA Global Communications, Inc. ("RCA").[7] Like WU, the IRCs are subject to regulation by the FCC.

The IRCs transmit international telegrams through a limited number of "gateway" cities.[8] ITT Worldcom, for example, routes all of its international telegraph traffic through one of the three cities, New York, Washington, and San Francisco, which the FCC has authorized it to use as gateways. The IRCs accept international telegrams from the public at offices maintained in their gateways, and provide a limited number of teletypewriters directly to subscribers within those cities.[9] Unlike WU, however,

---

[7] *International Record Carriers Communications,* 38 F.C.C. 2d 543, 545 (1972).

While RCA has not intervened in this proceeding it was a party to the proceeding below and sought there the same relief as that sought by WUI and ITT Worldcom in this Court.

[8] The statutory basis for the "gateway" is found in the Western Union merger legislation which provides, in defining the term "domestic telegraph operations" for purposes of that legislation:

> "That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States." 47 U.S.C. §222(a)(5).

[9] *See, The Western Union Telegraph Co.,* 29 F.C.C. 2d 422, 424 (1971); *International Record Carriers' Communications, supra,* 38 F.C.C. at 545.

the IRCs do not maintain a nationwide system for accepting, transmitting and delivering telegrams in the "hinterland" beyond the gateway cities.[10] Indeed, under Section 222(a)(5) the IRCs are legally barred from carrying international record traffic beyond their present gateways without the approval of the FCC.[11] The IRCs are therefore almost totally dependent on WU's domestic network to originate outgoing international telegrams in the hinterland, and transmit them to the IRCs' facilities in the gateways.[12] The IRCs then carry the telegrams to their overseas destinations, where they are delivered by the IRC or the local telegraph company. Similarly, incoming international telegrams intended for recipients in the hinter-

---

[10] *See, The Western Union Telegraph Co.* and *International Record Carriers' Communications,* both *supra.*

[11] *International Record Carriers' Communications,* 40 F.C.C. 2d 1082 (1973).

[12] The only exception to WU's complete control over international telegraph traffic originating in the hinterland is the so-called "paid direct access" which hinterland customers have to the IRCs. See *All American Cables and Radio, Inc.,* 15 F.C.C. 293 (1949); *International Record Carriers' Communications, supra.* Paid direct access permits a hinterland customer to transmit his international telegrams to the IRC's offices in the gateways by telephone or by telex call, at his own expense. However, the customer must pay the full international telegraph tariff fee which would have been charged had he sent the telegram through WU, and he must, in addition, pay the full cost of sending the telegram to the gateway, either by long distance telephone or by telex. Thus, the customer must pay a premium for using paid direct access instead of sending his telegram through WU. Although paid direct access often increases the speed and the accuracy with which a telegram is transmitted, many hinterland users are unwilling to pay this premium to use it, and the existence of direct paid access in no way lessens the IRCs' dependence on WU as to these customers. As to those hinterland customers who do use paid direct access, it should be noted that the telex messages they use to transmit international telegrams to the IRCs must still be carried over WU's domestic telex network, even though they need not be manually handled by WU.

land must be delivered by WU. Even in the gateways, where the IRCs have teletypewriters of their own, much of the international traffic originates from WU's public telegraph offices or on teletypewriters leased from WU.[13] Thus a large percentage of the international telegrams handled by the IRCs must be carried over WU's domestic network during part of the journey between sender and recipient.

At present, the international telegraph traffic originating on WU's domestic network must be transferred to an IRC for transmission overseas, and the sender has equal access to any one of the competing IRCs. WU's telex subscribers may decide which of the IRCs will carry international telegraphs by connecting their teletypewriters to the facilities of the IRC of their choice, by a process as simple as dialing the appropriate telex number.[14] A customer who files an international telegram in one of WU's public telegraph office may designate which of the IRCs is to carry his message. Telegrams for which no such designation is made by the customer are allocated among the IRCs pursuant to a formula.[15] Thus, each IRC pres-

---

[13] *The Western Union Telegraph Co., supra,* 29 F.C.C. 2d at 424.

[14] WU was required to make direct access to the IRCs available to its telex customers as a condition of the FCC's approval of the TWX acquisition. *The Western Union Telegraph Co.,* 29 F.C.C. 2d 422 (1971).

[15] The international formula pursuant to which WU distributes international traffic among the IRCs has its origin in the Western Union merger legislation. Section 222(e) of Title 47, U.S.C., provides:

> (2) In the case of any consolidation or merger pursuant to this section of telegraph carriers which, immediately prior to such consolidation or merger, interchanged traffic with telegraph carriers in a contiguous foreign country, the consolidated or merged carrier shall distribute among such foreign telegraph carriers, telegraph traffic by wire or radio destined to points in such contiguous foreign country and shall divide

ently has an opportunity to compete for international telegraph business originating in the hinterland. The danger inherent in WU's reentry into international telegraph operations is that WU, through the exploitation of its domestic monopoly, could preempt the hinterland's international telegraph traffic for its own international facilities.

The threat which WU's proposed reentry into international operations poses to the competitive viability of the existing carriers in the international telegraph industry arises because the IRCs are dependent upon WU for origination or delivery of international telegrams in the hinterland beyond the international gateways. The extent of the IRCs' dependence on WU is graphically illustrated by comparing the limited facilities which ITT Worldcom maintains within the United States, consisting of approximately 5,000 teletypewriters located in three gateway cities, with WU's domestic network of approximately 100,000 teletypewriters installed throughout the country. Should WU be allowed to resume international operations, it would be able to exploit its domestic monopoly and divert international telegraph traffic to itself to the detriment of the IRCs. It is obvious that WU would,

---

the charges therefor, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* that in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection. As used in this paragraph, the term "contiguous foreign country" means Canada, Mexico, or Newfoundland.

if given the choice, transmit international telegrams originating in its public telegraph offices via its own international facilities rather than those of an IRC, even though the IRC might offer more attractive services or a lower tariff, because WU would wish to keep for itself the revenue generated by the international segment of the transmission. Thus, WU's domestic monopoly would make it impossible for the IRCs to compete with WU for international traffic if WU were allowed to resume international operations.

The problems and inequities inherent in allowing WU to compete with the IRCs while it is the sole domestic telegraph carrier were considered by Congress in 1943, when it added Section 222 of the Communications Act.[16] At that time, Postal was in serious financial difficulty and it was feared that Postal might fail, disrupting domestic telegraph service. To prevent this, Congress enacted Section 222 to provide a procedure through which WU could lawfully merge with Postal, despite the prohibitions of the federal antitrust laws and the antimonopoly provisions of the Communications Act.[17]

At the time Congress was considering the proposed WU-Postal merger, WU operated a number of transoceanic cables and was a major carrier of international traffic. International traffic was also handled by a number of IRCs, including the predecessors of ITT Worldcom and RCA, which did not have their own domestic networks. Prior to the merger of WU and Postal, these

---

[16] The legislative history of Section 222 is discussed *infra*, p. 15.

[17] Section 314 of the Communications Act prohibits any merger of carriers of communications by wire and radio "the purpose . . . and/or effect [of which] may be to substantially lessen competition or to restrain commerce, . . . or unlawfully create monopoly in any line of commerce." See p. 39, below.

carriers could obtain access to the domestic facilities they needed through Postal if WU refused to make its facilities available on a reasonable basis. However, the absorption of Postal by WU left the independent IRCs totally dependent on WU, a competitor in the international sphere, to provide the domestic services which were essential to their continued existence as international record carriers. To deal with the dangers inherent in such a situation, Congress directed in Section 222 that the proposed merger of WU and Postal should not be approved by the FCC unless WU agreed to divest itself of its international telegraph operations. Recognizing that, as a practical matter, such divestiture might not be possible immediately following the merger and that even after divestiture the monopoly power of WU could be used in a predatory fashion against one or another of the IRCs, Congress provided additional protection to the IRCs by requiring WU to distribute traffic and divide revenue among all international carriers, including its own international facilities, in accordance with an international formula which would be just, reasonable and equitable.

Subsequent to the enactment of Section 222, WU and Postal applied to the FCC for approval of a plan of merger. Such approval was granted on September 27, 1943, and the merger was consummated shortly thereafter.[18]

In approving the merger, the FCC found that WU could reasonably be required to divest itself of its international telegraph operations within one year after the merger.[19] At WU's request, that period was thereafter extended

---

[18] *Application for Merger of The Western Union Telegraph Company and Postal Telegraph, Inc.*, 10 F.C.C. 148 (1943); *Western Union Telegraph Co.* v. *U.S.*, *supra*, 267 F.2d at 718.

[19] *Western Union Telegraph Co.* v. *U.S.*, *supra*, 267 F.2d at 719.

by the FCC on eight separate occasions so that WU had still not divested itself of its international operations when, on March 5, 1952, the FCC instituted a proceeding to determine what further action it should take with respect to divestiture.[20] That proceeding culminated on July 9, 1958, with an order requiring, *inter alia,* that WU present a plan to the FCC providing for divestiture within six months after the FCC's approval of the plan.[21] WU appealed from the entry of that order, and this Court, while endorsing the FCC's objective of achieving divestiture promptly, vacated the order on the narrow grounds that the FCC erred in fixing a deadline for divestiture without having found that due diligence on WU's part could produce a feasible plan prior to the deadline.[22] The infirmity found by the Court in the FCC's order was rectified on remand, and after the FCC rejected the first plan of divestiture proposed by WU, WU submitted a second plan which was approved with modifications by the FCC on February 27, 1961.[23] Finally, on September 30, 1963, twenty years after the FCC's approval of the WU-Postal merger, WU transferred its international operations to WUI, an independent corporation unaffiliated with WU.[24]

---

[20] *Id.*

[21] *Western Union Telegraph Co.*, 25 F.C.C. 35 (1958); *rev'd., Western Union Telegraph Co.* v. *U.S., supra.*

[22] *Western Union Telegraph Co.* v. *U.S., supra,* 267 F.2d at 724-25.

[23] *Application for Merger of the Western Union Telegraph Company and Postal Telegraph, Inc.,* 30 F.C.C. 323. A summary of the FCC proceedings to that point is found at 30 F.C.C., 324-25.

[24] See *Application for Merger of the Western Union Telegraph Co. and Postal Telegraph, Inc.,* 35 F.C.C. 233 (1963). During the period between February 27, 1961 and September 30, 1963, the

The instant proceedings involve WU's attempt to re-establish international telegraph operations for the first time since that divestiture.[25]

b) *The proceedings below before the FCC*

On April 4, 1972, WU filed with the FCC, pursuant to the requirements of Section 214 of the Communications Act, 47 U.S.C. §214,[26] an application for authority to lease and operate the facilities necessary to provide Mailgram service between the continental United States and Hawaii.[27]

Mailgrams are a form of record communication substantially identical to traditional telegrams. A Mailgram is originated as any other telegram would be, and is then transmitted over WU's domestic network. However, delivery of a Mailgram differs from more familiar forms of telegraph service in one respect. A Mailgram is not

---

FCC approved several minor modifications of the divestiture plan and postponed divestiture until the latter date. See 30 F.C.C. 951 (1961); 32 F.C.C. 441 (1962); 34 F.C.C. 922 (1963); 35 F.C.C. 233, *supra*.

[25] Order, p. 5; A16.

[26] Section 214 provides in pertinent part:

"No carrier shall undertake the construction of a new line or an extension of any line, or shall acquire or operate any line or extension thereof . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, . . . of such additional or extended line . . .".

[27] WU's Application to Provide Mailgram Service to Hawaii is reproduced in the Appendix at A-71. Proposals to offer telegraph services between the continental U.S. and Hawaii which are essentially similar to WU's Mailgram have been filed by ITT Worldcom, WUI, RCA, Domestic Satellite Corporation and Hawaiian Telephone Company, in conjunction with WU. Order, p. 7; A20.

sent to a WU facility for delivery; instead, it is transmitted to a WU teleprinter installed in a United States Post Office and the Post Office, under an agreement with WU, delivers the Mailgram to the recipient with the next regularly scheduled mail delivery.[28]

Pursuant to the FCC's rules,[29] WU's application to provide Mailgram service to Hawaii was referred to the FCC's Common Carrier Bureau (the "Bureau"). ITT Worldcom and WUI petitioned the Bureau to reject WU's application on the grounds, generally, that the FCC had no power to grant WU's request for authority to resume international operations.[30] By letter dated April 19, 1972 (A61), the Bureau advised WU that it was refusing to accept WU's application for filing for reasons which it summarized as follows:

"a. The proposed service [i.e., Mailgram service to Hawaii] is an international telegraph service;

"b. Section 222 is intended to preclude [WU] from providing future international telegraph services, as well as those provided in 1943, in competition with the independent international telegraph carriers; and

---

[28] The description of Mailgram service contained in the foregoing paragraph is taken from the FCC's Order, pp. 8-9; A23-A24.

[29] 47 C.F.R. §0.299.

[30] ITT Worldcom's Petition to Reject is reproduced in the Appendix at A105.

Although Hawaii is, of course, a State, telegraph service between the continental United States and Hawaii constitutes international telegraph operations by statutory definition. Section 222(a) defines the term "continental United States" for purposes of Section 222 as meaning "the District of Columbia and the States of the Union, except Hawaii." "International telegraph operations" are defined to include record communications originating or terminating outside the "continental United States" or certain designated North American points.

> "c. The [FCC], therefore, has no authority to grant the instant application, even if it were considered in the public interest, absent an amendment of Section 222 of the Communications Act." A69-A70.

On May 19, 1972, WU appealed the Bureau's decision to the full Commission. WU filed memoranda in support of its application and opposing memoranda were filed by WUI and RCA.[31] Three years later, the FCC entered the Order which is the subject of this Petition to Review. In the Order, the FCC reversed the action of the Bureau and ordered that WU's application be accepted for filing, to be considered in connection with other carriers' applications to provide Mailgram or similar service to Hawaii.[32] The FCC reasoned that the divestiture clause of Section 222 did not prevent it from approving WU's Mailgram application because Mailgram was a new form of communication service not within the contemplation of Congress when it enacted Section 222 in 1943.[33]

WUI filed a Petition for Review of the FCC's Order in this Court on July 2, 1975. Because the Court's decision will have a major impact on the future structure of the international telegraph industry, ITT Worldcom intervened in support of the WUI Petition on July 24, 1975.[34]

---

[31] WU's pleadings before the FCC are reproduced in the Appendix at A109 and A206. WUI's pleadings in opposition are found at A157 and A250; RCA's pleading at A136.

[32] Order, p. 6; A18.

[33] Order, p. 8; A21.

[34] The Petition for Review is reproduced at A1; ITT Worldcom's motion to intervene is at A279.

Argument

ITT Worldcom submits that the FCC erred when it refused to recognize that Section 222, which permanently bars WU from reentering international telegraph operations, applies with full force to international Mailgram service and mandates the rejection of WU's proposal to offer that service.

ITT Worldcom further submits that other provisions of the Communications Act and the antitrust laws, which the FCC failed to consider in its Order, also prevent WU from offering Mailgram service to Hawaii while it retains a monopoly over domestic telegraph service.

POINT I

Section 222 is a permanent bar to WU's reentry into international telegraph operations.

An examination of both the legislative history of Section 222 and the decisions of the FCC and of this Court applying that Section demonstrates that Section 222 was intended to exclude WU permanently from all international telegraph operations. The FCC's current interpretation of Section 222, holding WU can legally provide international Mailgram service to Hawaii because such service is a "new" service not within Congress' contemplation when that Section was enacted, is supported by neither the precedents nor the facts of this case, and is in all events totally at odds with the fundamental purpose of Section 222.

a) ***The legislative history of Section 222***

The enactment of Section 222 was the culmination of a thorough study of the telegraph industry conducted by the Senate Committee on Interstate Commerce (the "Committee") pursuant to Senate Resolution 95, 76th Cong., 1st Sess. (1939).[35] The study was prompted by the precarious financial condition of Postal and the fear that Postal's difficulties would be resolved by "a merger or consolidation which would result in the creation of a monopoly detrimental to the public, the industry, and labor."[36]

During the two years following the adoption of S. Res. 95, the Committee undertook a comprehensive examination of the problems facing the telegraph industry. At the Committee's request, the FCC submitted studies of both the domestic and the international telegraph industries.[37] The Committee then heard the testimony of 49 witnesses, representing the FCC and other government agencies, the armed forces, the domestic and international telegraph carriers, telephone companies, and labor organizations.

---

[35] The Committee's study was preceded by other examinations of the problems of the telegraph industry. A study of the entire communications industry, including telegraph carriers, was prepared by the House of Representatives' Interstate and Foreign Commerce Committee prior to the enactment of the Communications Act; this study was published as H. Rep. 1273, 73rd Cong., 2nd Sess. (1934).

Section 4(k) of the Communications Act directed the newly-created FCC to propose such amendments to the Act as it deemed desirable. In 1935, the FCC suggested to Congress that a new section be added to permit consolidations of telegraph carriers, but Congress took no action. See S. Rep. 769, 77th Cong., 1st Sess. (1941), p. 3.

[36] S. Res. 95, 76th Cong., 1st Sess. (1939); S. Rep. 529, 76th Cong., 1st Sess. (1939), p. 4.

[37] The FCC recommended that legislation be enacted to permit permissive merger of the domestic carriers. S. Rep. 769, 77th Cong., 1st Sess. (1941), p. 4.

S. Rep. 769, 77th Cong., 1st Sess. (1941), p. 4. By the time the study concluded, Postal had come through one reorganization but was nevertheless losing approximately $180,000 per month. It had spent all but $750,000 of a $5,000,000 working capital loan from the Reconstruction Finance Corporation and was in "imminent financial danger". *Id.* The Committee found that there would be a serious disruption of telegraph service, injuring both the public and the war effort, if Postal were to terminate or reduce service, *Id.* at p. 20, and it concluded that the best means for avoiding the consequences of Postal's failure was a merger between Postal and WU. Since such a merger was then unlawful under both the antitrust laws and the antimonopoly provision of the Communications Act, the Committee recommended the Act be amended to provide the limited exemption from these statutes necessary to permit such a merger. *Id.* at p. 25.

The Committee realized that monopolization of domestic telegraph service, which would result from the merger it recommended, posed a serious threat to the IRCs:

> "Should Postal cease operations, Western Union will have in fact, if not in name, a monopoly in the handling of the ordinary commercial messenger business within the United States. In view of the fact that this company also is a major overseas cable operator, under such an eventuality its control over pick-up and delivery facilities within the United States would seriously impair the operation of its competing international carriers." *Id.* at p. 20.
>
> * * * * *
>
> "With the exception of the domestic offices maintained by the radio-telegraph companies, heretofore mentioned,[38] the carriers engaged primarily in interna-

[38] At the time of the Committee's study, two international radiotelegraph carriers maintained offices for pick-up and delivery of

tional telegraph do not have their own terminal facilities for the pick-up and delivery of their messages within the United States. They rely on contractual arrangements with domestic wire and radio carriers. In the event of a merger of all domestic carriers (without a simultaneous consolidation of all international carriers), the resulting domestic company would become the sole pick-up and delivery medium for the international carriers. It would be necessary, therefore, that a condition precedent of such a domestic merger be a proper formula for fair division of the international business between the competing international carriers." *Id.* at p. 22.

To protect the IRCs, the Committee recommended that the telegraph industry be divided between domestic and international carriers, with common control of domestic carriers and international carriers prohibited. The FCC was to be given authority to require WU to divest itself of its international facilities if it found such a divestiture to be in the public interest, and the FCC was to regulate the division of traffic between domestic and international carriers. Specifically, the recommendations provided in pertinent part:

"[T]he committee recommends

1. That the Congress approve an amendment to the Communications Act of 1934, permitting—

(a) Domestic American telegraph carriers to merge; and

---

telegrams in a few major cities in the hinterland. These domestic networks were rudimentary in comparison to WU's. See S. Rep. 769, 77th Cong., 1st Sess. (1941), p. 7. The radio-telegraph carriers' facilities outside their gateways were abandoned during World War II for security reasons and were never reinstalled thereafter. Appendix to Order, p. 7, note 19; A41.

(b) International American telegraph carriers to merge;[39] but with

(c) A proviso that there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity; and

(d) the legislation . . . shall not prevent the inclusion of all existing operations of any domestic carriers, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest; and

(e) There should be no requirement that the domestic or international mergers be carried out simultaneously or at all; and

* * * * *

---

[39] The Committee's recommendation that international carriers be permitted to merge was not as broadly supported as the domestic merger. While the proposal was supported by a majority of the FCC, it was opposed by a minority which felt that the merger of the competing IRCs would hamper technological advances in telegraph service. The international merger was also opposed by the War Department and Navy Department. *Id.* at p. 6. The original telegraph merger legislation, S. 2445, contained the authorization for international mergers suggested by the Committee, but that provision was deleted by the Committee before the bill was reported to the floor as S. 2598.

While the proposal to permit consolidations among international carriers had its supporters, there is nothing in the legislative history evidencing support for mergers between international and domestic carriers. To the contrary, it was thought that such mergers should be restricted to prevent the "formation of a huge overall single telegraph-cable radio-telegraph combine." S. Rep. 13, 78th Cong., 1st Sess. (1943), p. 3.

> "(i) The legislation should grant the Federal Communications Commission appropriate regulatory powers with respect to the fair and equitable treatment of traffic between the domestic and international carriers." *Id.* at p. 25.

Thus, in contrast to the assertion made by the FCC in its Order, p. 6 (A17), the Committee clearly envisioned the division of the telegraph industry between separate domestic and international carriers. Indeed, the Committee was so concerned with preserving the separation of international and domestic carriers that it recommended that mergers of domestic and international carriers be explicitly banned by statute, a provision which in all probability would have been superfluous in view of the restraints the existing antitrust laws placed on such a merger.

The Committee's recommendations were embodied in a bill cosponsored by Senators McFarland and White, S. 2445, 77th Cong., 2nd Sess. (1942). In his remarks introducing the bill, Senator White stated:

> "If written into law, the bill will legalize the consolidadation of domestic telegraph companies, and a consolidation of international telegraph companies. It does not, however, permit the consolidation of domestic and international companies.
>
> * * * * *
>
> "*These provisions* [*i.e.*, the consolidation and divestiture provisions of the bill] *assure, we believe, an effective separation of domestic communications from international communications.*" 88 Cong. Rec. 3415, 3416 (April 9, 1942) (emphasis added).

While the Committee's recommendations suggested only that the FCC be empowered to restrict WU to domestic operations if the FCC found such a restriction to be in

the public interest, the bill declined to delegate this function to the FCC. Instead, the bill's divestiture clause substituted an unqualified Congressional mandate that WU's international operations be divested subsequent to any merger between it and Postal.[40] Thus the legislative history of Section 222 demonstrates that while Congress considered giving the FCC the discretionary control over WU's future international activities which the FCC now claims, Congress declined to delegate that authority to the FCC and instead decided itself that WU should be excluded from international operations.

S. 2445 was referred to the Interstate Commerce Committee. After hearings, that Committee reported out a substitute bill, S. 2598,[41] which differed from S. 2445 primarily in that it deleted the authorization for the consolidation of international carriers.[42] S. 2598 retained from S. 2445 the requirement that the consolidated domestic carrier divest itself of its international operations.[43] That divestiture requirement was included in the telegraph merger legislation ultimately enacted by Congress.[44] In

---

[40] 88 Cong. Rec. 3416 (April 9, 1942).

[41] S. 2598 is set out at 88 Cong. Rec. 5417 (June 22, 1942).

[42] S. Rep. 1490, 77th Cong., 2nd Sess. (1942); 88 Cong. Rec. 5421 (June 22, 1942).

[43] S. 2598; 88 Cong. Rec. 5421 (June 22, 1942).

[44] S. 2598 was passed by the Senate with one clarifying amendment not here relevant. 88 Cong. Rec. 5423 (June 22, 1942). The House Committee on Interstate and Foreign Commerce then reported out a bill which did not include a divestiture requirement. H. Rep. 2664, 77th Cong., 2nd Sess. (1942), p. 3. The Committee thought that although divestiture was in the public interest, it was impractical, primarily because certain leases held by WU on transatlantic cables provided that the leases could not be assigned to another entity without a simultaneous assignment of WU's domestic facilities. *Id.* at p. 7. The cable leases in question are

bringing the final conference report before the Senate for pasage, Senator McFarland observed:

> "The conferees have agreed to a measure which represents, in the viewpoint of the conferees on the part of the Senate, the best features of both the House and the Senate bills.
>
> * * * * *
>
> "[The Conference Report] provided for the divestment by the merged carrier of any international operations which it was carrying on, so that the merged domestic carrier would not be put in a position to compete unfairly with other international carriers by giving preference to its own international lines." 89 Cong. Rec. 1092 (February 18, 1943).

Thus the legislative history of Section 222 establishes that (1) Congress did not, as the FCC implies, limit its attention to the particular forms of telegraph service available in 1943; Congress was instead concerned with the more basic question of how the telegraph industry should be structured to avoid the dangers posed by the WU-Postal merger; (2) by enacting the divestiture clause of Section 222, Congress decided that question itself, rather than delegating it to the FCC; and (3) Congress' solution was to

---

described in *Western Union Telegraph Co.* v. *U.S., supra,* 267 F.2d at 720.

The House failed to act on a telegraph merger bill during the 77th Congress. S. Rep. 13, 78th Cong., 1st Sess. (1943), p. 1. At the beginning of the 78th Congress, the Senate Committee reported to the floor a bill, S. 158, 78th Cong., 1st Sess. (1943), which was identical to S. 2598. *Id.* The House Committee reported out a bill which again failed to include a divestiture clause. H. Rep. 69, 78th Cong., 1st Sess. (1943). Both bills were quickly passed, and the conference report recommended adoption of the Senate's divestiture requirement, to which the House acceded. H. Rep. 142, 78th Cong., 1st Sess. (1943), p. 1; 89 Cong. Rec. 1141, 1144-5, 1146 (February 19, 1943).

exclude WU permanently from international telegraph operations.[45] The legislative history offers no support for the FCC's extraordinary contention that it has the power to ignore the Congressional purpose underlying Section 222 and authorize WU to reenter international operations.

b) *The precedents*

The cases enforcing Section 222 indicate that both the FCC and this Court have consistently interpreted that Section as having permanently excluded WU from international operations.

---

[45] Testimony given before the House committee considering S. 2598 indicates that the FCC concurred in Congress' decision to bar WU from any international activity. *Hearings on S. 2598 Before a Subcommittee of the House Committee on Interstate Commerce*, 77th Cong., 2d Sess. (1942). On the question of the proposed proviso to prevent consolidations of domestic and international carriers, FCC Chairman James T. Fly testified:

> "I think that proviso ought to be there in any case; that is, we do not want the domestic company to have any international arrangements; that is, any international properties or operations. There are so many difficulties there that we do not think it is wise to have a tie-in . . . I think that they ought to be severed from any international operations, and leave those operations to entire separate and independent companies." *Hearings*, p. 16.

A similar statement was made by Commissioner Clifford J. Durr:

> "I think there is no substantial disagreement anywhere on the proposition that the domestic combination should get out of the international business.
>
> "On the merits, it is clear that this is an essential requirement. Not only do the economic and practical factors indicate the advisability of a clean separation between the domestic and international sides of the communications field but the problem of distributing traffic to the international carriers by the domestic monopoly is infinitely more complicated so long as that domestic monopoly competes for international business with an ununified international industry." *Hearings*, p. 180.

The precedent most closely in point is the FCC decision *In Re Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960). In that proceeding, WU argued that it should be allowed to offer telegraph service to the new state of Hawaii, on the theory that upon Hawaii's admission into the Union, telegraph service between Hawaii and the continental United States had become domestic telegraph service to which the restrictions Section 222 placed on WU were inapplicable.[46] WU further suggested that if the FCC disagreed with its analysis of Section 222, it should recommend that Congress amend the Section to permit WU to serve Hawaii.

The FCC concluded that, in light of the legislative history and purpose of Section 222, it could not accept WU's contention that Section 222 could be construed as permitting WU to serve Hawaii as a domestic point.[47] In reaching

---

[46] Section 222(a)(5) defines "domestic telegraph operations" in terms of communications originating or terminating "within the continental United States." At the time Hawaii entered the Union, Section 222(a)(10), in turn, defined "continental United States" as the "District of Columbia and the States of the Union." WU's argument was that when Hawaii became a state, it became part of the "continental United States" as defined in Section 222, and that therefore telegraph service between Hawaii and the other states became domestic telegraph operations. 28 F.C.C. at 604-5.

[47] The FCC found that the purpose of Section 222 was to prevent WU from favoring either its own international facilities or a particular IRC after the WU-Postal merger. When enacting Section 222 to deal with this problem, Congress drafted definitions to distinguish domestic from international telegraph operations on the basis of whether an overseas transmission was necessary. In so doing, Congress considered the "geographic location of a point rather than the political affiliation" determinative. Therefore the term "continental United States" as used in Section 222 was merely a convenient shorthand designation for the then-admitted 48 States and Washington, D.C.; it did not make the political status of Hawaii a significant factor in the interpretation of Section 222. See 28 F.C.C. at 602-4, 605.

Congress subsequently accepted the FCC's interpretation when it enacted the Hawaii Omnibus Act, P.L. 86-624, §36 (1960), which

this result, the FCC rejected WU's argument that any ambiguity in Section 222 should be resolved by a construction which allowed WU to offer telegraph service to Hawaii:

> "Western Union argues that since in its view section 222 does not clearly and explicitly provide that service with Hawaii is an international telegraph operation, we should not interpret it as such because this interpretation would deprive us of power to permit or order such Western Union service even though it were required by the public interest, and argues that such result should be reached only in the face of clear and explicit language not here present. We cannot agree with Western Union's position as to how the statute may reasonably be interpreted. Instead, as indicated above, *the history and purposes of section 222 do not give rise to doubts as to meanings, but require an interpretation opposite to that advocated by Western Union. Since this is so, it appears that Western Union is suggesting that we exercise a power we do not have, namely, to authorize Western Union service with Hawaii as a domestic telegraph operation.* We might point out in this connection that the Western Union argument is equally applicable to Puerto Rico, the Virgin Islands, and all other U.S. possessions, as well as to all oversea foreign points. Since service to any of these points is undoubtedly an international telegraph operation, we cannot order or permit Western Union to provide such service, no matter how urgent the public interest. *If we find that the public interest requires that we should possess such power, the remedy is to ask Congress to amend section 222, not for us to misinterpret it.*
>
> * * * * *
>
> "Further, Western Union argues that statutes are not static but have prospective application, and that chang-

---

amended the definition of "continental United States" in Section 222 to explicitly exclude Hawaii. See S. Rep. 1681, 2 U.S. Code, Cong., & Admin. News, 86th Cong., 2d Sess. at 2979-80 (1960).

ing factual situations cause matters previously not affected by an existing statute to be affected thereby. It is unreasonable, it therefore states, to conclude that Congress meant forever to bar Hawaii from receiving domestic service and to prevent this Commission from permitting or requiring Western Union to provide such service even though we believe it to be in the public interest. While this Western Union argument may have validity as a general principle of statutory construction, it is not applicable to section 222. As we have stated . . . *one of the basic purposes of Congress in enacting section 222 was to fix firmly, on a geographic rather than a political basis, the area of service, i.e., oversea operations, prohibited to the merged company.* Such purpose is inconsistent with the canon of construction advocated by Western Union and makes it inapplicable in the instant situation.

* * * * *

"We must conclude . . . that in section 222 Congress intended that, as a condition to its merger with Postal Telegraph, *Western Union, as a domestic telegraph carrier, must withdraw from competition with the international telegraph carriers to oversea points, . . .*" 28 F.C.C. 604, 605, 606 (emphasis added).

Having rejected WU's argument that Section 222 as it then existed permitted WU to provide telegraph service to Hawaii, the FCC went on to find that WU had not made even a *prima facie* showing that the FCC should recommend Section 222 be amended to permit the extension of service WU proposed:

"As we have said, Congress required Western Union to divest its oversea operations, which it carried on in competition with telegraph carriers primarily engaged in oversea operations, to prevent it from favoring its own system with respect to traffic collected in the United States at places where the oversea carriers did not collect traffic.

> "We have no reason to believe that Congress was mistaken as to the dangers of Western Union competition in the oversea telegraph field. To the contrary, in a recent proceeding, in which we reviewed the problems presented by Western Union operations in the oversea field, we concluded that—
>
> > the reasons which impelled Congress to require divestment of Western Union's [international] telegraph operations have been amply justified by experience under a combined landline-cable operation.
>
> "In view of all this, we feel that the original considerations which led to the denomination of service with Hawaii as an international telegraph operation prohibited to the domestic telegraph carrier are valid today." 28 F.C.C. at 608-609.

Thus, in *Telegraph Service in Hawaii,* the FCC both enforced the permanent barrier Section 222 raises to WU's reentry into international operations, and acknowledged that Congress, not the FCC, must lift that barrier if changes in circumstances warrant such a modification of the statutory scheme. The FCC's forthright recognition in that case of the limits Congress placed on its discretion stands in sharp contrast to the approach of its instant Opinion, in which the FCC followed the course it had previously abjured of amending Section 222 by misinterpreting it.

Other decisions applying Section 222, while not dealing with factual situations so directly in point as *Telegraph Service with Hawaii,* likewise support the proposition that Congress meant Section 222 to be an on-going prohibition against WU's reentry into international telegraph operations. This Court's decision in *Western Union Telegraph Co.* v. *U.S.,* 267 F. 2d 715 (2nd Cir. 1959), took into account both the problem Congress faced:

> "In the hearings which preceded enactment in 1943 of §222 of the Communications Act [47 U.S.C.A. §222], under which the merger of Western Union and Postal became legally permissible despite the Federal antitrust laws, concern was voiced that the merged company, through ownership of the single remaining nationwide landline telegraph system, would be in a position to control the distribution of outbound international telegraph traffic and to favor its own international cable facilities." 267 F. 2d at 718

and the solution Congress intended to enact:

> "[T]he congressional desire [was] to divorce completely Western Union's virtual landline monopoly, following the merger, from all financial interest in international telegraph operations . . . ." 267 F. 2d at 723.

Similar statements as to the scope and effect of Section 222 are found in other decisions of the FCC and this Court concerning that Section's divestiture requirement or the formula it mandated for the division of international traffic.[48]

In summary, there is nothing in the decisions construing Section 222 to support the FCC's assertion that it has the authority to permit WU to resume international telegraph operations. To the contrary, the precedents demonstrate that Section 222 permanently bars WU from inter-

---

[48] *See, e. g.*, the FCC's 1958 divestiture decision, *Western Union Telegraph Co.*, 25 F.C.C. 35, at 43 and 94 (1958); *International Record Carriers Communications*, 38 F.C.C. 543 at 544-45 (1972).

In a decision regarding the interpretation of the international formula, *Western Union Telegraph Co.* v. *U.S.*, 217 F. 2d 579 (2nd Cir. 1954), this Court observed "It is ridiculous to suppose that the Formula contemplated strict surveillance of contemporary competition without also intending to limit the danger of Western Union Cable's expansion in the future." 217 F. 2d at 582.

national operations, and that it is for Congress, not the FCC, to relieve WU from this prohibition.

c) *The FCC's Order*

Faced with both a legislative history and a consistent line of decisions sharply at odds with its Order, the FCC attempted to reconcile its analysis with those inconsistent authorities by purporting to find a distinction between international telegraph services which were offered at the time the telegraph merger legislation was enacted and new forms of record communications which have been introduced since then. The FCC acknowledged that it had no power to authorize WU to resume the international activities in which it was engaged in 1943. However, the FCC asserted that Congress left it discretion to permit WU to offer new forms of international telegraph services, such as Mailgram, which it claimed were not within Congress' contemplation when the merger legislation was enacted. The FCC's effort to thus distinguish its Opinion from the precedents which should have been controlling is without basis in fact or law.

It is important to recognize just how much the FCC concedes in its Order. First, it admits that the Congressional purpose in enacting the divestiture clause was to protect the IRCs from WU's newly-achieved monopoly position:

> "[I]t does appear that the fundamental purpose of the divestment requirement was to protect against abuses which could follow upon the merger as a result of WU's position as the sole domestic pick-up and delivery agent for PMS[49] traffic in the United States.

[49] PMS is the FCC's abbreviation for "public message service," or traditional telegraph service. Order, p. 4; A13.

> Congress feared that WU would be able to use its domestic monopoly position unfairly to favor its international Cables Division in competing with international carriers in providing PMS service (which constituted virtually their entire business). Since the international carriers in 1943 operated only in the gateway cities, they were dependent on WU for the bulk of the domestic pick up and delivery of their PMS traffic. Thus, WU was in a position virtually to drive an international carrier or carriers out of business were it so inclined. It was in the context that Congress required WU to divest itself of its international operations and enacted the formula provisions." Appendix to Order, pp. 8-9; A45.[50]

Secondly, the Order concedes that it would be absurd if the divestiture clause were interpreted to allow WU to resume the same activities it had been required to divest:

> "We agree with WUI and RCA that a construction of the divestment provisions which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS operations in competition with the IRC's." Appendix to Order, p. 9; A45-A46.

Yet the FCC nevertheless finds that it has the power to authorize WU to extend Mailgram service to Hawaii because Mailgram is a "new" service not within the contemplation of Congress when it enacted Section 222:

> "After considering the policy of the divestment requirement, we conclude that the divestment clause required

---

[50] The citation is to the FCC's "Memorandum on Section 222, Its Legislative History and Various Commission Precedents," which is included as an appendix to the FCC's Order. It is reproduced in the Appendix herein at A30-A58.

> WU to divest itself of the international operations it was engaged in at the time of the merger, primarily PMS, and does not deprive this Commission of discretion to authorize WU to provide overseas points with new services that were not within the contemplation of Congress in 1943." Appendix to Order, p. 9; A46.

The propriety of the FCC's decision therefore rests squarely on the soundness of its finding that Mailgrams are somehow new and different from traditional telegrams. If they are not, the FCC concedes it could not authorize WU to carry them to Hawaii without making Section 222 "absurd and meaningless." When the issue is thus stated, the weakness of the FCC's position becomes readily apparent. For whatever inconsequential differences there may be in the methods by which Mailgrams and traditional telegrams are delivered, Mailgrams and telegrams are identical in the only respect relevant to Congress when it enacted Section 222. Both present the same opportunity for WU to abuse its domestic monopoly and favor its own international facilities at the expense of the IRCs. Therefore the FCC would contravene the Congressional policy behind Section 222 just as blatantly by permitting WU to offer Mailgram service to Hawaii as it would by authorizing WU to provide traditional telegraph service.

The fatal error in the FCC's analysis is the FCC's failure to examine whether its decision was consistent with the purpose of Section 222.[51] As the FCC itself rec-

---

[51] The FCC thus ignores a cardinal principle of statutory construction:

> "It is a familiar maxim of statutory interpretation that courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words leave room for a

ognizes, that purpose was to protect the IRCs from WU's domestic monopoly. With such a purpose in mind, it is illogical to hold, as the FCC did, that Congress intended only to bar WU from offering the kinds of international telegraph service which were familiar in 1943. For if that were true, WU would be free to reenter international operations and exploit its domestic monopoly simply by making minor changes in its pick-up or delivery methods, of the type involved here. Such an interpretation vitiates the protection Congress thought it was giving the IRCs when it enacted Section 222.

Congress was concerned not with any particular kind of telegraph service, but with the relationship between WU and the IRCs, and the danger to competition posed by WU's monopolization of domestic telegraph service. It is only reasonable to assume that Congress intended its solution to be coextensive with the problem it faced. Thus the only rational test of whether a purportedly "new" international telegraph service is within the prohibition Congress placed on WU's international activities is to examine whether WU would have an opportunity to misuse its domestic monopoly to the detriment of the IRCs if it were allowed to offer that service. If WU were allowed to carry international Mailgrams, it would un-

---

contrary interpretation." *Haberman* v. *Finch*, 418 F.2d 664, 666 (2nd Cir. 1969).

"And 'the starting point for determining legislative purpose is plainly an appreciation of the "mischief" that Congress was seeking to alleviate.'" *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1383 (2nd Cir. 1970), quoting from *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81, 107 (1961) (dissent).

See also *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2nd Cir. 1966); *Cappadora* v. *Celebrezze*, 356 F.2d 1, 4 (2nd Cir. 1966); *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.*, 326 F.2d 841, 844 (2nd Cir. 1963), *cert. denied* 376 U.S. 952 (1964).

deniably have the same chance to abuse its domestic monopoly as it would have if it were allowed to resume traditional international telegraph service, since Mailgrams are originated and transmitted over WU's domestic network in a manner identical to that employed to transmit other telegrams.

Indeed, Mailgram service is so nearly identical to traditional telegraph service that it is doubtful that these two communications services can be rationally distinguished for any purpose whatsoever. To deliver either a telegram or a Mailgram, a printed message is taken from the receiving teleprinter, placed in an envelope, and delivered by hand to the recipient's address. In the case of a telegram, these functions are the responsibility of WU's own employees. In the case of Mailgram, WU has hired the Post Office to carry out duties which would otherwise be performed by WU itself. The same sequence of events must occur to accomplish the delivery of either a telegram or a Mailgram; the only difference between the two is whether WU or the Post Office pays the salaries of the personnel responsible for the last few steps in the delivery process. It is therefore not surprising that the only court which has decided the question held that the introduction of Mailgram service did not create a new communications service. In *United Telegraph Workers, AFL-CIO* v. *F.C.C.*, 436 F.2d 920 (D.C. Cir. 1970), the Court upheld an FCC decision permitting WU and the Post Office to cooperatively offer Mailgram service. In the course of its opinion, the Court rejected an argument that Mailgram was a new "channel of communication" which required FCC certification pursuant to Section 214 of the Communications Act:

> "[T]he certification requirement of §214(a) does seem to require some more substantial change in existing services than is present here."
>
> * * * * *
>
> "[T]he mails are currently used to send confirmatory copies of telegrams delivered by telephone or wire. All Mailgram does is to place receiving teleprinters in post offices so that messages can be sent long distances by Western Union wire and then delivered in ordinary course as local mail. This limited and temporary combination of existing facilities does not rise to the magnitude of a new line or channel of communication requiring certification." 436 F.2d at 924-25 (footnote omitted).

The Court therefore decided that the certification requirements of Section 214 were inapplicable and that Mailgram service was properly introduced merely by filing a tariff amendment. *United Telegraph Workers* refutes the FCC's assertion that Mailgram is somehow a "new" communications service. Mailgram is certainly not "new" in any respect that is relevant to a proper analysis of Section 222, since it presents all the possibilities of competitive abuse of WU's domestic monopoly which Congress intended to prevent through that Section. Therefore, the prohibitions of Section 222 apply to Mailgram with full force.

In making its decision turn on the question of whether Mailgram was a kind of telegraph service within Congress' contemplation in 1943, the FCC has focused on a factor which is irrelevant to the Congressional purpose underlying Section 222 and is therefore legally insignificant.

Moreover, the FCC's contention that Congress did not contemplate the introduction of a telegraph service like Mailgram when it enacted Section 222 is inconsistent with the facts. Congress could easily have foreseen the intro-

duction of Mailgram when it added Section 222 to the Act, since there is obviously nothing technologically innovative about installing a teleprinter in a Post Office to receive Mailgrams rather than placing the same machine in a WU telegraph office. RCA's telegraph tariffs have in fact provided the option of delivery by ordinary post from a time roughly contemporaneous with the enactment of Section 222.[52] And, the legislative history shows that the possibility of a cooperative venture between WU and the Post Office was suggested to Congress by President Roosevelt himself. The President's comments were relayed to Congress through Secretary of Commerce Jones, when he testified before the Senate Interstate Commerce Committee during its consideration of the telegraph merger legislation:

> "I have discussed this matter with the President. I asked him if I might quote him as being in favor of the principles involved in this bill; at least, the principles I have discussed here, and he said that I was so authorized.
>
> "Furthermore, he made this suggestion to me, which he wanted me to bring to the subcommittee's attention as I understood him; that the legislation when enacted should make provision authorizing post offices to rent space where available space existed for telegraph offices; that there were hundreds, if not thousands, of places in the United States where it would be an economy to the Government and to the patron of the service, as well as a convenience to the public, to have telegraph offices installed in post offices." 88 Cong. Rec. 5420 (June 22, 1942).

Senator McFarland quoted this portion of Secretary Jones' testimony to the full Senate prior to its final vote on S.

---

[52] RCA's "Opposition to Application for Review of Action Taken Pursuant to Delegated Authority," p. 18; A153.

2598, the precursor of the merger telegraph bill ultimately adopted.[53] It is therefore clear that the possibility that WU and Post Office would someday cooperate to offer telegraph services was before Congress when it enacted Section 222. Thus, the FCC's current analysis of Section 222 is not only logically faulty; it is based on a factual premise which is incorrect.

In an attempt to bolster its Opinion, the FCC makes the simplistic observation that the public interest would best be served by including WU among those who are being considered as potential carriers of Mailgrams to Hawaii. Order, p. 6; A20. Congress has already determined that the public interest in limiting the scope of WU's domestic monopoly outweighs the benefits, if any, which might be realized if WU rather than some other carrier handles Mailgram service to Hawaii. It should be noted that the FCC's Opinion does not assert that WU can offer Mailgram customers any unique service or benefit which cannot be matched if one or more IRCs carried Mailgrams between the continental U.S. and Hawaii. Even if such benefits existed, it would be for the Congress, not the FCC, to determine whether they outweigh the value of the competition among IRCs which Congress protected in Section 222. As the FCC itself conceded in *Telegraph Service with Hawaii*,[54] its conception of the public interest cannot justify it in disregarding a clear Congressional mandate; Section 222 must be amended by legislative action, rather than by administrative misinterpretation.

One final argument of the FCC should be discussed. The FCC's Order states, in substance, that if the FCC allows WU to reenter competition with the IRC's, the FCC can-

---

[53] 88 Cong. Rec. 5417, 5420 (June 22, 1942).

[54] See p. 24, *supra*.

not assume that WU will act unfairly, and that if it did, the FCC has "ample authority under the Act to rectify abuses short of a sweeping prohibition." Order, p. 8; A22. The question of whether the FCC could effectively prevent WU from abusing its domestic monopoly is irrelevant, since Congress has not delegated that function to the FCC but has instead chosen divestiture as the proper remedy for the threat to competition created by WU's monopolization of domestic telegraph service.[55] Moreover, the history of the telegraph industry prior to WU's divestiture of its international operations shows that remedies short of a complete ban on all international activity by WU cannot effectively prevent WU from unfairly exploiting its domestic monopoly.

In asserting that it can prevent competitive abuses if WU is allowed to resume international service, the FCC is presumably alluding to its power under Section 222 to provide a fair formula for the distribution of international traffic among WU and the IRCs. Yet, the FCC has found in its 1958 divestiture decision[56] that the international formula

---

[55] In choosing divestiture as its remedy, Congress followed an approach familiar to antitrust courts. It has long been recognized that the most effective method of avoiding the anticompetitive results of an unlawful merger is not to scrutinize a defendant's conduct indefinitely to prevent it from abusing its market power, but to restructure the affected industry through divestiture and thereby eliminate the defendant's opportunity to act anticompetitively. As the Supreme Court has observed:

> "Divestiture has been called the most important of the antitrust remedies. It is simple, relatively easy to administer and sure. It should be in the forefront of a court's mind when a violation of [Clayton Act] §7 has been found." *U.S.* v. *E.I. du Pont DeNemours & Co.*, 366 U.S. 316, 330-31 (1961) (footnote omitted).

[56] *Western Union Telegraph Co., supra*, 25 F.C.C. 35 (1958), rev'd on other grd. 267 F.2d 715 (2nd Cir. 1959).

did not provide adequate protection to the IRCs while WU was active in international operations.

The FCC's opinion in the 1958 divestiture case describes WU's attempts to undercut the effectiveness of the international formula by limiting the number of "unrouted" telegrams, which the formula required WU to share with the IRCs. The international formula provided that if a sender of an international telegram designated WU or a particular IRC to carry the telegram, his designation was to be respected; thus, only "unrouted" telegrams for which no such designations were made by the sender were allocated pursuant to the formula. Beginning in 1949, WU accepted the designation "via Western Union Cables" on trans-Pacific telegrams even though WU had no facilities in that part of the world. WU then, in effect, sold the right to carry these telegrams to particular IRCs, rather than including them in the pool of unrouted messages to be shared fairly by all the IRCs. This attempt to circumvent the provisions of the formula was halted by the FCC, with this Court's concurrence,[57] but WU resorted to other methods of evasion more difficult to detect and prevent. An independent study by a polling organization disclosed that in many instances, WU's employees simply ignored the failure of a customer to designate a particular carrier, and marked unrouted telegrams for delivery "via Western Union Cables" in utter disregard for the pooling requirement of the formula.[58]

While in the foregoing examples the inadequacy of the international formula resulted from WU's intentional efforts to circumvent its provisions, the FCC also found

---

[57] *Western Union Telegraph Co.* v. *F.C.C.*, 217 F.2d 579 (2nd Cir. 1954).

[58] 25 F.C.C. at 65-66.

that WU's domestic monopoly gave WU certain inherent advantages that would limit the effectiveness of the formula even if WU acted in good faith. For example, WU's employees in the hinterland were in frequent personal contact with local telegraph customers, and the good will these contacts created influenced customers to designate Western Union Cables to deliver their international telegrams.[59] Similarly, WU's advertising expenditures benefited both its domestic and international operations.[60] After considering these and other problems, the FCC concluded:

> "Under the international formula, Western Union is in the dual position of an international participant and the initial judge of any differences of opinion which may arise as to formula interpretation. Assuming the best of faith on its part in its interpretation of the formula, Western Union cannot be regarded as an impersonal forwarder in the present conditions of conflicting interests. We think that it is manifest, from our extensive findings in this connection, that continued operation of the cables by Western Union gives rise to serious problems in the distribution of international telegraph traffic, and that *such problems cannot be alleviated other than by divestment. Thus, the reasons which impelled Congress to require divestment of Western Union's telegraph operations have been amply justified by experience under a combined landline-cable operation.*" 25 F.C.C. at 187. (emphasis added)

The past failure of the international formula to stop WU from abusing its domestic monopoly refutes the FCC's assertion that it can prevent similar abuses from recurring if WU is permitted to resume international operations.

---

[59] 25 F.C.C. at 63.

[60] 25 F.C.C. at 65.

In short, then, the FCC's Order offers no logical reason for disregarding the clear teaching of the legislative history and the precedents: Section 222 was intended by Congress to bar WU permanently from international telegraph operations.

POINT II

WU's proposed reentry into international telegraph operations is barred by the antitrust laws.

Even if Section 222 did not prevent WU from resuming international operations, WU's proposal to offer Mailgram service to Hawaii violates the antitrust laws; in particular, Section 2 of the Sherman Act and Section 314 of the Communications Act.[61]

Because the IRCs are dependent on WU to originate telegraph messages in the hinterland, they cannot offer full Mailgram services between all areas of the mainland and Hawaii without WU's cooperation. Thus, if the FCC allows WU to compete with the IRCs to carry Mailgrams to Hawaii, WU will have, by virtue of its domestic monop-

---

[61] Section 314 forbids the use of radio by a telegraph company to transmit communications where the purpose or effect thereof "may be to substantially lessen competition or to restrain commerce . . . or unlawfully to create monopoly in any line of commerce." The Section is applicable to WU's Mailgram plan because WU is proposing to use radio transmission facilities to transmit Mailgrams from the mainland to Hawaii.

Section 314 (formerly Section 17 of the Radio Act of 1927, 44 Stat 1169) is in substance "little more than a restatement of certain provisions of the Sherman and Clayton Acts." Lovett, "The Antitrust Provisions of the Radio Act," 2 *Journal of Radio Law*, 1, 2 (1932). It was apparently included in the Radio Act to make the anticompetitive conduct it prohibited subject to the penalties provided by the Radio Act, which were stiffer than those provided by the antitrust laws. *Id.*

oly, the power to curtail the access of the IRCs to the domestic facilities they need to compete effectively with WU. Merely by originating its own Mailgram service to Hawaii, WU would therefore necessarily achieve monopoly power in the Hawaiian market for Mailgrams, under the classic test that monopoly power is the power to exclude other competitors from a market.[62]

It is well established that WU cannot extend its domestic monopoly into new geographical areas without running afoul of Section 2 of the Sherman Act. In *U.S.* v. *Griffith*[63] the Supreme Court condemned the use of the monopoly power which the defendants held in certain localities to compete unfairly in other locations where they had competitors. The Court observed:

> "[T]he existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power. It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market.' The anti-trust laws are as much violated by the prevention of competition as by its destruction. It follows a *fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.
>
> * * * * *
>
> "If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed." 334 U.S. at 107, 108 (citations omitted).[64]

---

[62] *U.S.* v. *E. I. DuPont DeNemours & Co.*, 351 U.S. 377, 391 (1956); See also *U.S.* v. *Griffith*, 334 U.S. 100, 107 (1948).

[63] 334 U.S. 100 (1948).

[64] See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 154 (1951); *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 358

In its application to provide Mailgram service to Hawaii, WU candidly stated:

> "An especially attractive feature of this service extension is the operational arrangement which will permit MAILGRAM Service between Hawaii and the Mainland to be fully integrated into Western Union's present domestic service at low cost." Application, p. 3.

WU therefore admits that it expects to "gain a competitive advantage" over the IRCs in the Hawaiian Mailgram market as the result of its domestic monopoly. Given the unique structure of the telegraph industry, in which the IRCs are unavoidably dependent on WU for essential domestic facilities, it is indeed impossible for WU to offer Mailgram service to Hawaii without foreclosing competition or gaining a competitive advantage through its domestic monopoly, thereby monopolizing the Hawaiian market and violating Section 2 under the test established by *Griffith, supra.*[65]

WU has in fact already indicated that it intends to make international Mailgram service part of its monopoly, and that to prevent the IRCs from competing with it, it

---

F. Supp. 780, 791 (S.D. Tex. 1971), aff'd. 476 F.2d 989 (5th Cir. 1973).

In *U.S.* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), aff'd 347 U.S. 521 (1954), Judge Wyzanski stated succinctly:

> "An enterprise that by monopolizing one field, secures dominant market power in another field, has monopolized the second field, in violation of §2 of the Sherman Act."

[65] Section 314 of the Communications Act is necessarily violated by WU's monopolization of the Hawaiian market, since that Section incorporates the broader Clayton Act prohibitions which reach even potentially anticompetitive behavior. *Cf. Brown Shoe Co., Inc.* v. *U.S.*, 370 U.S. 294, 328-29 (1962).

will do its utmost to deny them the access to the WU domestic network which they must have in order to offer international Mailgram service to their hinterland customers. Both ITT Worldcom and WUI have asked the FCC to order WU to establish certain interconnections between their international facilities and WU's domestic Mailgram facilities, which would allow the two IRCs to provide international services similar to Mailgram.[66] WU has strenuously opposed the two IRCs' requests, and makes it clear that it intends to supply international Mailgram service itself, without any competition from the IRCs.[67]

WU knows full well that the IRCs must have access to its domestic network if they are to become competing carriers of international Mailgrams. WU's refusal to interconnect with WUI and ITT Worldcom was made in complete disregard of the well-established duty of a monopolist to make its unduplicable facilities available to all competitors on a fair basis, and is in itself a violation of Section 2 of the Sherman Act.[68]

As *Griffith* indicates, it is irrelevant for the purposes of Section 2 that WU's domestic monopoly was acquired lawfully. Nor is it significant that WU is regulated in certain respects by the FCC. Thus, in *U.S.* v. *Otter Tail Power Co.*, 410 U.S. 366, 372 (1973), the Supreme Court held that a public utility's attempt to extend the geographic scope of its monopoly was subject to challenge under Section 2 of the Sherman Act even though the utility was regulated

---

[66] ITT Worldcom filed its Petition for Interconnection with the FCC on October 1, 1975.

[67] WU filed its Opposition of the Petitions of ITT Worldcom and WUI on November 3, 1975.

[68] *U.S.* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912). See also *U.S.* v. *Otter Tail Power Co., infra.*

by the Federal Power Commission.[69] The FCC's regulations of WU conveys no more antitrust immunity than did the FPC's regulation of Otter Tail.

Section 222, while legalizing the WU-Postal merger, does not give WU any further protection from the antitrust laws. That Section did no more than provide a mechanism by which the merger itself could be consummated lawfully; it does not provide an avenue by which WU can extend its domestic monopoly. As one Court of Appeals has stated, after examining Section 222 and a parallel section permitting telephone companies to merge:

> "These exemptions, however, have been specifically and narrowly drawn, and pertain solely to consolidations and mergers. They do not authorize or suggest a blanket exemption from the antitrust laws with respect to the regulation of rates, practices or services." *Industrial Communication Systems, Inc.* v. *Pacific Tel. & Tel. Co.*, 505 F. 2d 152 (9th Cir. 1974).

The FCC itself has accepted the proposition, advanced by the Justice Department, that Section 222 "does not have precedence over or supersede the antitrust laws." *Western Union Telegraph Co.*, 25 F.C.C. 35, 76-77 (1958).

WU's proposal to extend Mailgram service to Hawaii is thus an attempt to misuse its lawfully-acquired domestic monopoly "to create monopoly power in a separate but related field in which a monopolistic regulated industry is

---

[69] *Accord: U.S.* v. *Radio Corp. of America*, 358 U.S. 334 (1959) (dealing with the effect of FCC regulation); *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); *California* v. *F.P.C.*, 369 U.S. 482, 489 (1962).

The Court in *Otter Tail* went on to find that Section 2 was in fact violated under the test established in *Griffith*, 410 U.S. at 377.

not the national policy,"[70] and is therefore impermissible under the antitrust laws.

Since WU is barred by both Section 222 and the antitrust laws from offering Mailgram service to Hawaii, the FCC's erroneous decision that Section 222 did not prevent WU from reentering international operations would not have been dispositive of this matter even if it had been correct. Had Section 222 failed to include a permanent barrier to WU's international activities, it would in all probability have been because Congress concluded that, in light of the restraints the existing antitrust laws already placed on WU's international activities, it would be redundant and unnecessary to include additional restraints in Section 222. The FCC's contrary assertion, that the omission from Section 222 of a bar to WU's reentry into the international sphere would have indicated Congress' intent that the FCC should have broad discretion to authorize WU's resumption of international operations, is unrealistic. In view of Congress' overall purpose to protect the IRC's from abuses of WU's domestic monopoly, it would have been odd indeed if Congress had carefully mandated divestiture of WU's international facilities while giving the FCC unrestrained discretion to undo everything thus accomplished.

If Congress did not bar WU from international operations through Section 222, it must have been because Congress relied on the antitrust laws to restrain WU's future conduct. Since Congress' enactment of Section 222 with its divestiture provision is a Congressional finding that the antitrust laws prevented WU from continuing its international operations after the merger, it necessarily follows

---

[70] *Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F. 2d 478 (5th Cir. 1966). See also *Packaged Programs, Inc.* v. *Westinghouse Broadcasting Co., Inc.*, 255 F. 2d 708, 710 (3rd Cir. 1958).

that WU's current proposal to reenter international operations likewise violates the antitrust laws unless the structure of the telegraph industry has changed materially since Congress acted in 1943. No such changes in circumstances have occurred; WU retains the domestic monopoly over telegraph service it attained when it acquired Postal; and Congress' determination that WU's participation in international telegraph operations would violate the antitrust laws is just as valid today as it was then.

Conclusion

For the foregoing reasons, Intervenor ITT World Communications Inc. respectfully requests that this Court reverse in all respects the Memorandum Opinion and Order released by the Federal Communications Commission on June 23, 1975.

Dated: New York, New York
December 12, 1975

Respectfully submitted,

LeBoeuf, Lamb, Leiby & MacRae,
Attorneys for Intervenor,
ITT World Communications Inc.,
140 Broadway,
New York, New York 10005.
(212) 269-1100

Of Counsel:
Charles P. Sifton
John S. Kinzey
and
Howard A. White
John A. Ligon
ITT World Communications Inc.,
67 Broad Street,
New York, New York 10005.
(212) 797-3300

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC., Petitioner,	:	
- against -	:	No. 75-4132
THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents,	:	CERTIFICATE OF SERVICE
- and -	:	
THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS INC., Intervenors.	:	

JOHN S. KINZEY, being duly sworn, deposes and says:

1. I am an associate for the law firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Intervenor, ITT World Communications Inc.

2. I hereby certify that I have this day served the Brief of Intervenor, ITT World Communications Inc., by mailing true copies thereof to the attorneys for all parties at the listed addresses:

Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006

Ashton Hardy, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

Thomas E. Kauper, Esq.
Assistant Attorney General
Department of Justice
Antitrust Division
Washington, D.C. 20530

Mudge, Rose, Guthrie & Alexander
20 Broad Street
New York, New York 10005

Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

John S. Kinzey

Sworn to before me this
12th day of December, 1975

G. Anne Maccone
Notary Public

G. ANNE MACCONE
Notary Public, State of New York
No. 24-2446450
Qualified in Kings County
Commission Expires March 30, 1977